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In the Supreme Court of the United States

No. 772

OCTOBER TERM, 1962.

HARRY A. BLACHMAN,
As a Taxpayer,
Petitioner,

against

ERIEVIEW CORPORATION,
CITY OF CLEVELAND, OHIO,
HOUSING AND HOME FINANCE AGENCY,
ROBERT C. WEAVER, ADMINISTRATOR,
PUBLIC HOUSING ADMINISTRATION,
ROBERT C. WEAVER, ADMINISTRATOR,
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

HARRY A. BLACHMAN,
1420 Illuminating Building,
Cleveland 13, Ohio,
Counsel for Petitioner.

E. A. PLAZER,
114 Engineers Building,
Cleveland 14, Ohio,
Of Counsel.

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To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Sixth Circuit, entered in the above matter on December 19, 1962.

OPINIONS OF THE COURTS BELOW.

The United States District Court Memorandum Opinions filed May 31, 1962 and June 20, 1962 appear in the appendix to the Brief of Appellant filed in the Sixth Circuit and the Opinion of the United States Court of Appeals, for the Sixth Circuit, filed December 19, 1962 is set forth in the Appendix to this Petition at pages 12-15.

JURISDICTION.

This action originally brought in the United States District Court relied for jurisdiction on *Article III, Section 2 of the United States Constitution*, relating to a "law of the United States" and controversy thereunder "to which the United States is a party." Said law is *42 U. S. C. paragraph 1460 (c)*.

The judgment of the trial court was also invoked under *42 U. S. C. paragraph 1404 (a) and 42 U. S. C. paragraph 1456 (c) (1)*, which authorize the Public Housing Administration and the Housing and Home Finance Agency to *"sue and be sued"* with respect to its functions of slum clearance and extension of federal financial assistance in relation thereto.

The judgment of the Supreme Court of the United States is invoked under *28 U. S. C. paragraph 1254 (1)*.

All questions as to jurisdiction were waived by the several respondents at the time this matter was before the United States Court of Appeals.

QUESTIONS PRESENTED.

1. The question is whether, under *42 U. S. C. 1460 (c)*, the Federal Government may or may not extend financial assistance, with respect to an urban renewal area in downtown Cleveland, when such area is *not predominantly residential in character.*

STATUTES INVOLVED.

The statutory provision involved is *42 United States Code Section 1460 (c), as amended by Section 413 of the Housing Act of 1959* on September 23, 1959, which reads as follows:

"Financial assistance shall not be extended under this title with respect to any urban renewal area which is not predominantly residential in character and which, under the urban renewal plan therefor, is not to be redeveloped for predominantly residential uses:

Provided: That if the governing body of the local public agency determines that the redevelopment of such an area for predominantly nonresidential uses is necessary for the proper development of the community, the Administrator may extend financial assistance for such a project:

Provided, further, That the aggregate amount of capital grants contracted to be made pursuant to this title with respect to such projects after the date of the enactment of the Housing Act of 1959 shall not exceed 20 per centum of the aggregate amount of grants authorized by this title to be contracted for after such date."

STATEMENT OF THE CASE.

The plaintiff, as a taxpayer of the City of Cleveland, under authority of Sections 87 and 90 of the Cleveland City Charter, brought this action in the United States District Court for the Northern District of Ohio, Eastern Division, to restrain "the misapplication of funds of the City" and "abuse of its corporate powers" and "performance of the hereinafter mentioned contracts made in behalf of the City in contravention of law."

The defendants are Erieview Corporation, proposed Developer, the City of Cleveland, the Housing and Home Finance Agency and Public Housing Administration, agencies of the Federal Government, charged with administrating slum clearance and urban renewal projects, and Robert C. Weaver, Administrator of said agencies, and the United States Government.

The City of Cleveland had entered into a written agreement on March 3, 1961 with the Housing and Home Finance Agency, wherein the federal authorities were committed to make a loan to the City of Cleveland in the sum of $33,875,784.00 and to make a capital grant of $9,898,784.00 and to make relocation payments of $805,000.00 for the purpose of enabling the City to purchase lands in downtown Cleveland in an area commonly referred to as "Erieview."

On November 9, 1961 the City entered into a written contract with Erieview Corporation, the proposed developer, for the sale of a part of the land, within said Erieview area, approximating five acres. The City agreed to sell said land to the developer for $2,225,000.00, whereas the acquisition cost of said land exceeded $3,000,000.00, thereby threatening a loss to the City and its taxpayers of over three quarters of a million dollars unless said agreement is cancelled or modified to eliminate such subsidy.

The plaintiff states that the consideration for both of the aforesaid agreements, relating to the same and adjacent lands, consists of mutual promises, partly illegal, in that the Federal Government is specifically forbidden by Public Law 86-372, 86th Congress, S.2654, September 23, 1959, 42 U. S. C. No. 1460(c), Title IV, from giving "financial assistance to any urban renewal area, which is not predominantly residential in character and which, under the urban renewal plan therefor, is not to be redeveloped for predominantly residential uses."

Counsel for the City of Cleveland has indicated in the court below that he is in accord with the statement of facts submitted by the plaintiff insofar as it is limited to the identity of the parties, the March 3, 1961 agreement between the City and the United States providing for the financing of the Erieview I redevelopment project; the fact

that on November 9, 1961 the City entered into a contract with Erieview Corporation to sell a part of the land in Erieview project for redevelopment by the Corporation under City and United States control; and the fact that the area is not predominantly residential, but is zoned for commercial and semi-industrial purposes and contains a relatively small number of residential occupancies.

The petitioner seeks to enjoin the extension of federal financial assistance in said Erieview area, which is admittedly nonresidential. The petitioner asks that the contract of March 3, 1961 be declared illegal and cancelled. The petitioner asks that the contract of November 9, 1961 with Erieview Corporation be cancelled or modified to eliminate the alleged illegal subsidy.

The District Court for the Northern District of Ohio granted a motion to dismiss the plaintiff's amended complaint for failure to state a claim in which relief could be granted. Said motion was filed by the defendant City of Cleveland in which the other defendants joined. The plaintiff appealed.

The case comes to this Court on appeal from the order and judgment of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment of the District Court.

The United States Court of Appeals for the Sixth Circuit further held:

> "Plaintiff's action pursuant to 28 U. S. C. 1653 to amend his complaint to allege the jurisdictional amount more fully is granted. Since under local law he sues in the right of the municipality, the amended allegation of financial loss to it appears to be sufficient. It may also be assumed that the plaintiff presents a case or controversy suitable for determination in federal Court." (*See Petition, Appendix, page 12.*)

REASONS FOR GRANTING THE WRIT.

The federal statute, *42 U. S. C. No. 1460 (c)*, as set forth in this petition, authorizes federal agencies to allocate funds for urban renewal projects *only* in areas which are *predominantly residential in character.*

Said statute *forbids* such financial assistance in an urban renewal area which is *"not predominantly residential."*

The statute reads:

> "Financial assistance shall *not* be extended * * * with respect to any *urban renewal area* which is *not predominantly residential in character* * * *."

The lower courts' decisions have, in effect, eradicated the fourth word of the above sentence, the word *"not."* The government agencies, which have flaunted the directive of the Congress of the United States, would have one believe that the statute reads: *"Financial assistance* **shall** *be extended with respect to any urban renewal area which* **is not predominantly residential in character.**"

The purpose of Congress was just the opposite. The act of Congress was just the opposite.

The 1949 Housing Act, Public Law 171 of the 81st Congress, S. 1070, was entitled:

> *"An Act*—To establish a national housing objective and the policy to be followed in the attainment thereof, to provide federal aid to assist slum clearance projects and low-rent public housing projects initiated by local agencies, to provide for financial assistance by the Secretary of Agriculture for farm housing, and for other purposes."

The *purpose of the Housing Act of 1949* is set forth in part as follows:

> *Sec. 2.* "The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require hous-

> ing production and related community development sufficient to remedy the serious housing shortage, the elimination of sub-standard and other inadequate housing through the clearance of slums and blighted areas and the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth and security of the Nation."

Not only does the federal statute require (1) that the subject area be *predominantly residential*, but also (2) that *such an area* must be *redeveloped* for *predominantly residential uses*, except under certain conditions which are set forth in the Proviso clause which follows the first part of the statute.

The Proviso permits *nonresidential redevelopment* in *predominantly residential areas*, if the governing body (the City Council here) determines that it is desirable to *redevelop nonresidentially*.

For example,—the "Gladstone" area is a predominantly residential and blighted area located two miles from downtown Cleveland. Were it not for this Proviso, it would be necessary to *redevelop* the Gladstone area for *predominantly residential uses*. Presently nonresidential redevelopment is being planned and approved for the Gladstone area and such nonresidential *redevelopment* is proper and not subject to challenge, because of the Proviso. That is all that the Proviso authorizes. The Proviso cannot change the character of the subject area in the first part of the statute, which is a *predominantly residential area*.

When the District Judge overruled the plaintiff's application for a rehearing, he said (p. 17a of Pltf's Appendix):

"As stated in the original memorandum, the plaintiff relied upon part of the statute which provided for the redevelopment of residential areas and neglected to properly recognize the legal effect of the additional provision, which is as follows: Provided, That if the governing body of the local public agency determines that the redevelopment of such an area for predominantly nonresidential uses is necessary for the proper development of the community, the administrator may extend financial assistance under this title for such project * * *."

In conceding that the first part of the statute describes a *residential area,* the District Judge unwittingly had the complete answer to the issue in this case. He then leaped over his own finding and came to an opposite conclusion.

In oral argument before the United States Court of Appeals Mr. O'Loughlin, Assistant Law Director for the City of Cleveland, said and we quote: "If there were a period at the end of the first part of the statute, Mr. Blachman would be right."

If the subject area is a *predominantly residential area* in the forepart of the statute, then the subject area cannot change and become a nonresidential area. It cannot be both. Therefore, "*such an area*" in the Proviso clause can only mean the predominantly *residential area* which alone can qualify for federal financial assistance pursuant to the statute.

This is a Housing Law. Its intention was always to secure "a decent home and suitable living environment for every American family." A new intention cannot be read into the amended law by any careless comment which departs from the clear expression of the law as enacted.

See 50 *Ohio Jurisprudence* 2d No. 171, pages 142, 143 on the subject of *Unexpressed Intention*:

> "In the construction of statutes it is the expressed legislative intent that is of importance. The law does not concern itself with the legislature's unexpressed intention, and no supposed intent of that body, aliunde the statute, can supplant the words used. The question is not what the general assembly intended to enact, but the meaning of that which it did enact. * * *"

The respondents' contention would nullify the clear purport of the statute, which allocates funds for *predominantly residential urban renewal areas. There is no other statute for such authority.*

It is unthinkable that the clear and unambiguous language of this statute could be translated into such a destructive result.

See *Lane v. U. S.* (C. C. A. 6th), 17 Fed. 2d, 923:

> "Strict construction does not mean that the statute should be so construed in a spirit of hostility or so construed as to render it practically inoperative and ineffectual, so as to defeat the obvious purpose of the legislature."

Both parts of the statute are operative by following your petitioner's interpretation. Nonresidential redevelopment is authorized in certain cases as pointed out, without invalidating the prime purpose of this statute.

The Area Redevelopment Act has no application in the Erieview area, since it provides a fund of about $300 million, to be used from 1961 through 1965, when and where the Secretary of Commerce finds that more than 6% unemployment persists, in which event the area seeking to qualify for federal financial assistance may be residential or nonresidential.

The language of the Area Redevelopment Act *recognizes* that *42 U. S. C. No. 1460(c)* requires that the subject area seeking to qualify for federal financial assistance must be one predominantly residential or an area to be redeveloped for predominantly residential uses. The language of said Act pertinent thereto reads as follows:

> "Subject to the provisions of subsection "e" of this section, the Administrator may provide such financial assistance under this section without regard to the requirement or limitations of section 110(c) [*which is 42 U. S. C. 1460(c)*] that the project area be predominantly residential in character or be redeveloped for predominantly residential uses under the urban renewal plan, and without regard to any of the limitations of that section on the undertaking of projects for predominantly nonresidential uses * * *." Public Law 87-27, 87th Congress, S. 1, *May 1, 1961*, Section 14, New Section 113(b).

Furthermore, the *Urban Renewal Manual of the Housing And Home Finance Agency* interpreted the above provision under date of *5/24/62* under the heading of *3-2 Project Eligibility of Categories of Project Eligibility*, as follows:

> "F. Area Redevelopment Exception Project
>
> An area redevelopment exception project is excepted from the requirement of Section 110(c) of Title I that the project area must be predominantly residential in character or must be redeveloped for predominantly residential uses."

CONCLUSION.

We have the most unusual, certain and positive act of the Congress itself, when it wrote into another section of the Code in the Area Redevelopment Act of 1961 the positive words:

> **"* * * without regard to the requirement of section 110(c) [which is 42 U. S. C. 1460(c)] that the project area be predominantly residential in character or be redeveloped for predominantly residential uses under the urban renewal plan and without regard to any of the limitations of that section on the undertaking of projects for predominantly nonresidential uses * * *."**

When the Congress has so clearly set forth in the Area Redevelopment Act of 1961 the exact meaning of 42 U. S. C. 1460(c), how can the clear and unambiguous language of the Congress be misunderstood or misinterpreted?

No comments or declarations as to the meaning of 42 U. S. C. 1460 (c) can have more finality than the declaration of the Congress itself on May 1, 1961 in the Area Redevelopment Act.

For the foregoing reasons this petition for a writ of certiorari should be granted, so that the disposition of hundreds of millions of dollars of urban renewal funds shall not be in jeopardy.

Respectfully submitted,

HARRY A. BLACHMAN,
1420 Illuminating Building,
Cleveland 13, Ohio,
Counsel for Petitioner.

E. A. PLAZER,
114 Engineers Building,
Cleveland 14, Ohio,
Of Counsel.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Decided December 19, 1962.

Before: O'SULLIVAN and SMITH (U. S. Circuit Judge, Second Circuit, sitting by designation) and BOYD, District Judge.

SMITH, Circuit Judge. The City of Cleveland is proceeding with federal assistance to redevelop through its "Erieview" project a commercial area for commercial uses. The Cleveland City Charter permits a taxpayer to institute proceedings to restrain "the misapplication of funds of the City, or abuse of its corporate powers, or execution or performance of any contract made in behalf of the City in contravention of law" after demand to institute such a suit has been made on the City Director of Law and he has refused. See Cleveland City Charter, Sections 87, 90. Plaintiff-appellant, as a taxpayer, brings such an action in federal court, alleging that the City has entered into an illegal contract with the United States for loan to the City of funds for urban renewal unauthorized by statute and a second illegal contract with the Erieview Corporation for sale to it of lands for redevelopment under the first contract. Federal question jurisdiction is claimed to exist under 28 U. S. C. 1331. Plaintiff's motion pursuant to 28 U. S. C. 1653 to amend his complaint to allege the jurisdictional amount more fully is granted. Since under local law he sues in the right of the municipality, the amended allegation of financial loss to it appears to be sufficient. It may also be assumed that plaintiff presents a case or controversy suitable for determination in federal court. *Cf. Everson v. Board of Education*, 330 U. S. 1 (1947); *Doremus v. Board of Education*, 330 U. S. 429, 343-35 (1952).

The land which the Erieview Corporation is to redevelop is part of a Cleveland project known as "Erieview" which is aimed at redeveloping a predominantly commercial area for commercial uses. This is the same project unsuccessfully attacked in *Grisanti v. City of Cleveland*, 179 N. E. 2d 798 (Ohio C. P. 1961), *aff'd* 181 N. E. 2d 299 (Ohio Ct. App. 1962), *appeal dismissed*, 173 Ohio State 386, 182 N. E. 2d 568 (1962), *appeal dismissed for want of a substantial federal question*, 31 U. S. L. W. 3154 (U. S. Sup. Ct. November 6, 1962). The statute which the apellant here claims to have been violated by the federal grant of funds is 73 Stat. 675 (1959), as amended, 42 U. S. C. 1460 (c) which provides as here relevant:

> "Financial assistance shall not be extended under this subchapter with respect to any urban renewal area which is not predominantly residential in character and which, under the urban renewal plan therefor, is not to be redeveloped for predominantly residential uses: *Provided*, That, if the governing body of the local public agency determines that the redevelopment of such an area for predominantly nonresidential uses is necessary for the proper development of the community, the Administrator may extend financial assistance under this subchapter for such a project: *Provided further*, That the aggregate amount of capital grants contracted to be made pursuant to this subchapter with respect to such projects after September 23, 1959, shall not exceed 20 per centum of the aggregate amount of grants authorized by this subchapter to be contracted for after such date."

The District Court for the Northern District of Ohio, Ben C. Green, J., granted a motion to dismiss the complaint for failure to state a claim on which relief could be granted filed by the defendant City of Cleveland in which the other defendants joined, and plaintiff appeals. The

Court did not pass on other questions of jurisdiction and governmental immunity in view of the dismissal. We affirm the judgment dismissing the action.

The District Court concluded from a reading of the statute and the relevant legislative history that a contract such as the one between the City and the United States was authorized by the statute, and that the plaintiff had therefore made no showing of illegality. This contract being proper, the subsidiary contract between the City and Ericview Corporation was also found to be legal.

Appellant's efforts to reword the statute so as to prohibit the contracts in suit are unavailing. The meaning of the statute is quite plain as it is written, even without the strong reinforcement found in the legislative history referred to in Judge Green's memorandum below. The provision in terms authorizes redevelopment of "such an area." This plainly refers to "any urban renewal area which is not predominantly residential * * * and which * * * is not to be redeveloped for predominantly residential uses * * *." Appellant argues that the statute should be restated in positive terms by eliminating the "nots." This may be an interesting exercise in semantics, but quite plainly alters the meaning of the language as used, which is that a limited portion (at that time 20%) of the funds only was to be available for redevelopment of areas neither predominantly residential in origin nor in ultimate use. No claim has been advanced that the requisite determination has not been made by the governing body of the local public agency or that the aggregate amount of capital grants contracted to be made under the proviso in question exceeds 20 per centum of the aggregate amount under the subchapter. Appellant's contentions on interpretation of the statutory provisions border on the frivolous.

Judgment affirmed."

JUDGMENT.

(Filed December 19, 1962.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.